



## THE NATIONAL FOUNDATION FOR AMERICAN POLICY

August 25, 2005

The Honorable Elaine L. Chao  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Dear Secretary Chao:

I am writing to inquire about the policy viability and legality of the Department of Labor's recent statement that it will prohibit more than one pending labor certification application per employer for the same employee. This abrupt change in policy was announced in the department's August 8, 2005 "Frequently Asked Questions" (FAQ) on the Permanent (PERM) Labor Certification Program Final Regulation. I had a good working relationship with the Department of Labor when I served in the Bush Administration as Executive Associate Commissioner for Policy and Planning and Counselor to the Commissioner at the INS and was surprised by this change in policy.

While I understand from a later posting that this answer to the Frequently Asked Questions" was removed from the web site, the DOL site now states: "The Department is considering questions and information stakeholders have submitted in response to this FAQ posting, and will be developing and posting a clarified response in the near future."

Employment-based immigration is essential to America's ability to attract and maintain many of the best minds from all over the world. Currently, an estimated 300,000 labor certification applications have been mired in backlogs that have left employers often waiting more than four years for action on their cases. According to employers, the new PERM program is resulting in quicker decisions, generally within one to two months, so individual employees are pressing their employers to file applications through PERM. For logical reasons, employers would like to maintain current labor certification cases now pending in the backlog when filing a PERM case.

First, many employers have waited years for a decision and have spent more than \$5,000 per case in recruiting, legal and other fees. A company with 300 pending labor certification applications will have at least \$1.5 million in sunken costs in these cases, meaning to wipe the slate clean would represent a significant waste of finances for such an employer. Conservatively, DOL's policy change would cost U.S. employers tens of millions of dollars in wasted effort should their pending applications be canceled.

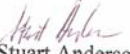
Second, given that priority in the queue for employment-based immigrant visas is determined by the date a labor certification application is filed, it makes sense that employers would not want to lose that priority date. This is particularly important given that employment-based immigrant visas are becoming backlogged due to the 140,000 annual limit and the per country limits on applicants from India and China. Also, canceling a previously filed labor certification could affect the legal status of an individual who has been in the country more than 6 years in H-1B status.

Third, announcing such a significant change of policy without proper notice and comment would appear to be in direct violation of the Administrative Procedures Act.

There is still time to evaluate the wisdom of this policy. Moreover, the Department of Labor must do far more to solve the problem of a backlog that permits individuals and employers to wait more than four years for action on their labor certification applications.

The Department of Labor has created and maintained a bureaucratically driven process for labor certification that has caused individuals and employers to wait years for decisions on their cases. At a time when Americans are concerned about illegal immigration, the Department of Labor is foreclosing options for employers and employees who have followed the legal immigration process. While PERM holds the prospect of creating a more timely procedure for employers, the Department of Labor should not introduce new restrictions with no genuine basis in law or policy that punish employers and employees who have played by the rules.

Sincerely,

  
Stuart Anderson  
Executive Director